No. 12384

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KIYOSHI KAWAGUCHI,

Appellant,

vs.

DEAN ACHESON, as Secretary of State of the United States,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

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INDEX

CASES CITED

CASES CITED (Continued)

UNITED STATES CODE

STATUTES

RULES OF CIVIL PROCEDURE

LOCAL RULES

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JURISDICTION

The jurisdiction of the District Court is conferred by the provisions of Section 903, Title 8, U.S.C. (The Nationality Act of 1940, Section 503).

STATEMENT

This is an appeal from a judgment of dismissal (R. 18) entered on the 29th day of July, 1949.

Notice of appeal was filed September 23, 1949, (R. 20) but no bond for costs on appeal was filed.

The record on appeal was filed in the District Court October 20, 1949, (R. 36) and in this Court October 24, 1949, appellant having theretofore and on January 16, 1950, obtained an order of this Honorable Court to file typewritten record on appeal. That typewritten record was filed with the Clerk of this Court on October 24, 1949, and four copies forwarded to the United States Attorney at Seattle, Washington, February 17, 1950, and received February 20, 1950.

Appellant's typewritten brief was served upon the United States Attorney by air mail March 21, 1950, and was received at Seattle, Washington, March 22, 1950.

THE RULES REQUIRE:

That bond for costs on appeal (Rule 73c) be filed with the notice of appeal. No bond for costs was so filed.

MOTION TO DISMISS APPEAL

Appellee moves that the appeal herein be dismissed for failure of appellant to file a cost bond at the time of filing notice of appeal or at all.

ARGUMENT ON MOTION TO DISMISS APPEAL

It is provided by Rule 73(c) Federal Rules of Civil Procedure as follows:

> "Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal. The bond shall be in the sum of Two Hundred and Fifty Dollars, unless the court fixes a different amount * * *".

No such bond was filed with the notice of appeal.

This being a requirement of the appeal itself, and this court as well as other appellate courts having heretofore held that the timely filing of the notice of appeal is mandatory and jurisdictional, it would seem to follow that the requirement of security for costs on appeal is likewise mandatory and jurisdictional.

> *National Union of Marine Cooks & Stewards v. Matson Nav. Co.*, 171 F. (2), 179 (9 Cir.).

No bond having been filed within the time fixed by the rule, it is respectfully submitted that the appeal be dismissed.

Without waiving the foregoing motion to dismiss, but insisting thereon, we will proceed to the merits.

PRELIMINARY STATEMENT

The complaint in this cause, brought under the provisions of Section 503 of the Nationality Act of 1940 (T. 8, Sec. 903 U.S.C.A.), was filed August 14, 1948, (R. 2) and after issue joined was set for trial July 22, 1949, but continued to July 28, 1949, on the oral motion of counsel for appellant. (R. 33)

The complaint alleges that plaintiff is a citizen of the United States, born at Shelton, Washington, November 24, 1919. That he is a permanent resident of the County of King, State of Washington. That in 1938, while a minor, he went to Japan to further his education and that ten years later, to-wit, in February, 1948, he desired to return to the United States. That he applied for a passport at the United States Consulate at Yokohama, Japan, and on March 4, 1948, his application was rejected on the ground that he was no longer a citizen or national of the United States because of his naturalization as a Japanese citizen in 1943. *The complaint admits that in 1943 he became a Japanese citizen.* (R. 3)

As appears from the original exhibit transmitted

to this court by virtue of the order of the trial court (R. 32) dated October 14, 1949, appellant was born at Shelton, Washington, on November 24, 1919, of Japanese parents. He was registered at the American Consular office at Tokio, Japan, from April 14, 1939, until November 24, 1940. On December 1, 1940, he again applied for registration as an American citizen, which application was approved, but *limited in validity to July 12, 1941.*

He failed and *neglected to take any further action with the American Consular officers in Japan until after hostilities had ceased.*

On March 25, 1943, and while this country was at war with the Imperial Government of Japan, appellant was *naturalized as a Japanese citizen.*

On March 4, 1948, almost five years after renouncing his American citizenship for Japanese citizenship, appellant applied to the American Consular office at Yokohama, Japan, for a passport, which was refused because of the act of appellant in renouncing his American citizenship in 1943 and acquiring that of the Japanese Empire. It is therefore a little difficult to see how, after an absence of ten years, it could under any circumstances be successfully claimed by appellant that he would be entitled to the privileges granted by the provisions of Section 903, Title 8,

U.S.C., which authorizes a certificate of identity entitling one in a foreign country to admission to the United States for the purpose of prosecuting a suit to determine his nationality under the facts pleaded in his complaint.

It is fair to assume under the admitted facts that after Pearl Harbor appellant was employed in furtherance of and for the Japanese war effort against the United States.

STATEMENT OF THE CASE

The complaint in this case was filed in the District Court August 4, 1948, (R. 2). The answer was filed February 11, 1949 (R. 5). In due course and on May 3, 1949, order was entered for assignment May 31, 1949. The cause was transferred from Judge Bowen's calendar to the calendar of Judge Black on June 2, 1949, and placed on the call calendar for June 3, 1949, at 10:00 A. M. On June 3, 1949, the case was set for trial July 22,1949, at 10:00 A. M. July 21, 1949, trial date was continued to July 28, 1949, on oral motion of plaintiff (appellant) (R. 33).

On the trial date designated the appellant was represented by one of his counsel, William Y. Mimbu,

of Seattle, and the trial was commenced in this manner:

> "THE COURT: The Court will now consider the cause of Kiyoshi Kawaguchi, the plaintiff, versus George C. Marshall, as Secretary of State, defendant, Cause No. 2068.
>
> MR. MIMBU: Your honor, in both of these cases George C. Marshall was named originally as Secretary of State, and I would like to make an oral motion to substitute Dean Acheson for George C. Marshall, as Secretary of State.
>
> THE COURT: Any reason such motion should not be granted?
>
> MR. BELCHER: No. (R. 23)
>
> THE COURT: The motion for substitution in Cause No. 2068 is granted. The motion for substitution of Mr. Acheson for Mr. Marshall is granted in Cause No. 2154."

Counsel for appellant then stated that counsel from Los Angeles had sent an affidavit which was filed that day (July 28, 1949) for a continuance. To this request the Court replied: (R. 25)

> "THE COURT: Both this Cause 2068 and Cause 2154 were set for trial some time ago. The court was advised by Mr. Bell, the clerk, that he had communicated with Mr. Mimbu, one of the attorneys for the plaintiff, and Mr. Mimbu's only request was that both cases be set for the same date. The court did set both cases for the same date. And for what date was that, Mr. Bell?
>
> MR. BELL: The trial date was originally set for July 22.

THE COURT: It was set for July 22. The court had not even a hint that neither case would not be tried until one week ago. At that time the Court, probably in error, struck Cause 2154 from the trial calendar and placed it on the assignment calendar for this morning. The court further, perhaps in error, continued Cause 2068 from July 22, the date for which it was set, until today, making clear, however, to counsel that as far as Cause 2068 was concerned, we expected it to be tried today. I said the court may have been in error in that the court probably on the state of the record should have insisted that these cases be tried on July 22, 1949, in accordance with the setting.

I may say that while it may be the law that that the plaintiff in Cause 2154 did lose his citizenship, the court recognizes more persuasion in the position of one who contends that voting in a foreign election was not realized by him to cancel his American citizenship than the contention of another plaintiff that his being naturalized as a Japanese citizen was not realized as terminating his American citizenship. There was a period in this country when a woman who married in the United States an individual residing in the United States, but not admitted to American citizenship, lost her American citizenship although she was born in the United States, lived all her life, and continued to live here after her marriage, too, although she did not realize she was losing her citizenship. In comparison with that situation, it may be that one who voted in a foreign election should have to be judged to have forfeited his American citizenship. But in any event, because I have a sympathy for one in the predicament of the plaintiff in

Cause No. 2154, I will endeavor to give plaintiff in that cause a date for trial not earlier than about October of this year. But in Cause 2068 it seems to me that the court is not justified in granting a further continuance." (R. 26-27)

Appellant, after the court's ruling and ordering the trial to proceed, offered no evidence, and the appellee, in support of the affirmative defenses set up in his answer offered in evidence a duly certified copy of the records of the State Department as Exhibit "A", which was admitted in evidence.

"THE COURT: Any objection to defendant's Exhibit 'A' for identification?

MR. MIMBU: No objection.

THE COURT: Exhibit 'A' admitted." (R. 29)

Then followed:

"MR. MIMBU: If your Honor please, in checking this over, I think the fact remains that the plaintiff has not been furnished with certificate of identity, which has been requested. Frankly, without the plaintiff present, we have no evidence to present to the court. The only alterative we have is to take a non-suit, if that can be permitted; and we request a non-suit be entered in this case.

MR. BELCHER: I think the motion is too late.

THE COURT: You move for a non-suit?

MR. MIMBU: Yes.

MR. BELCHER: I think the motion is too late.

THE COURT: I think the motion for non-suit should be and it is denied." (R. 30)

THE COURT: The plaintiff in this action is not entitled to relief. His action is dismissed. (R. 31)

SUMMARY ARGUMENT

The trial court did not abuse its discretion in the denial of the motion for continuance made at the hour and on the date the case was regularly set for trial.

Rule 40, Local Rules of Civil Procedure of the United States District Court for the Western District of Washington provides:

"*Absence of Parties when case is called.*

When an action is regularly called for trial or hearing, if either party fail to appear, the party appearing may, unless the court otherwise direct, proceed with the trial or hearing and take either a dismissal of the cause or such verdict or judgment as may be proper upon the evidence."

The Federal Rules of Civil Procedure provide for the taking of depositions in foreign countries (Rule 28b) and although counsel knew more than six months before the trial date that the Consul General in Japan would not issue the certificate of identity applied for, no effort was made to take appellant's deposition. The sole idea has been to get appellant into the United States.

An examination of the applicable statute which entitles one in a foreign country claiming American nationality to a certificate of identity specifically provides:

> " * * * and from any denial of an application for such certificate, the applicant shall be entitled to appeal to the Secretary of State, who, if he approves the denial shall state in writing the reasons for his decision."

There is no showing whatever, that appellant has availed himself of this administrative remedy.

Neither did the District Court abuse its discretion in denying appellant's motion for a non-suit at the close of the case, because such motion was not timely made, and there was an entire lack of diligence, both in seeking a continuance and in moving for a voluntary dismissal.

On dismissal, the Rules of Civil Procedure by Rule 52(a) require findings of fact.

I.

IT WAS NOT AN ABUSE OF DISCRETION TO DENY APPELLANT'S REQUEST FOR A CONTINUANCE.

The record clearly shows that counsel for appellant knew when the action was commenced in 1948 the reason a passport was refused was appellant's previous renunciation of his American citizenship, because it is alleged in paragraph V of the complaint

(R. 2) that appellant was registered at birth by his parents with the Japanese Consulate. That in 1939 while still in Japan, appellant rescinded his Japanese nationality and *four years later*, in 1943 he resumed his Japanese citizenship.

The record further shows, by the affidavit of Mr. Wirin, filed the day of the trial, July 28, 1949, (R. 8) that for nearly a year before the trial date, counsel knew the reason for the refusal of the State Department to grant appellant a passport and, to use counsel's own language:

> " * * * both plaintiff and affiant as his counsel took steps seeking the return of plaintiff to the United States for the purpose of testifying in the above entitled case. * * *"

It says nothing whatever about appealing to the Secretary of State.

The affidavit further goes on with hearsay and has attached what purport to be copies of certain letters written by counsel to the United States Consul and purported answers by the United States Consul to counsel in Los Angeles, California.

While the complaint was filed in August, 1948, (R. 2) it was not until January, 1949, a period of five months, that counsel even made inquiry as to the status of appellant's application to the Consulate for a certificate of identity to enable appellant to return to

the United States to testify. The affidavit of counsel shows further that he waited another six months (until July 5, 1949) (R. 9) before he made further inquiry of the Consulate.

This, we assert, shows an utter lack of diligence upon the part of counsel. Surely during all of this time application could have been made to the court to take the deposition of appellant in Japan either orally or on written interrogatories, yet no such application was made. No doubt appellant's testimony, if taken would be self-serving and to the effect that he did not intend to renounce his American citizenship when he actually did so and in the very nature of things would be required to do so in order to become a naturalized Japanese citizen, the acquisition of which appellant admits in his complaint. At least some corroborating evidence would be necessary, yet no claim is made that it was counsel's intent to have other witnesses resident in Japan present were appellant to come to the United States for the purpose of offering this self-serving testimony which undoubtedly would be rejected, on objection, as self serving.

No affidavit has been filed herein signed by appellant setting forth any activity on his part seeking to acquire the necessary certificate of identity to enable him to come to the United States to prosecute

his claim to American citizenship except in October, 1948. All we have is the hearsay affidavit of Mr. Wirin. (R. 8) Certainly this affidavit alone cannot be seriously taken as worthy of consideration by the trial court in passing upon the application for a continuance.

ARGUMENT

The provisions of Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) do not go to the extent of entitling a person in a foreign country *who admits in his pleading* (R. 3, par. V of complaint) *that he is an alien*, to a certificate of identity which would entitle him to come to the United States for the purpose of explaining his reason for renouncing his American citizenship. That is precisely what the complaint filed herein seeks to do and asks our American courts to forgive appellant and restore him to that which he renounced at a time when this country was in mortal combat with the Empire for which he forsook his American birthright.

Where a native-born citizen of the United States expatriates himself, he is no longer a citizen of this country, but an alien.

Reynolds v. Haskins (1925) 9 F. (2d), 473;

Savorgnan v. United States (Jan. 9, 1950), 338 U.S. 491.

II.

IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR NON-SUIT AFTER THE CASE WAS CLOSED.

Counsel for the appellant when the case was called for trial opened the case for appellant by moving to substitute Dean Acheson as defendant in place of George C. Marshall, former Secretary of State. Then presented orally a motion for continuance based upon the hearsay affidavit of A. L. Wirin of Los Angeles, California — one of counsel for appellant. (R. 23-25)

The Court denied the motion. (R. 27) Appellant's counsel apparently being content to rest on his motion for a continuance, offered no evidence.

Appellee offered only a copy of the record before, and certified by, the State Department, Ex. A., and rested. (R. 28) Whereupon, Mr. Mimbu of counsel for appellant made what may be termed a motion for non-suit (R. 29), which upon objection as coming too late (R. 30) was by the court denied.

The denial of a motion for non-suit, under the circumstances herein set forth, is not an abuse of discretion.

Rule 41(b) provides for involuntary dismissal as follows:

"For failure of plaintiff to prosecute * * * a defendant may move for dismissal of an action * * *."

Rule 52 — R.C.P. provides:

"In all actions tried upon the facts without a jury, * * * the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *"

The courts have construed those rules in the following cases:

Young v. United States, 111 F. (2d), 823, (9 Cir.);

Gary Theatre Co. v. Columbia Pictures Corp., 120 F. (2d), 891, 892, (7 Cir.);

Allred v. Sasser, 170 F. (2d), 233, (7 Cir.).

In the instant case appellant offered no evidence and after appellee had offered his evidence, the motion for a non-suit was made.

Rule 41(c) provides, inter alia:

" * * * A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made * * * before the introduction of evidence at the trial or hearing."

Hence, our claim that the motion came too late.

ARGUMENT IN ANSWER TO APPELLANT

The burden of appellant's argument on his first point is that irrespective of lack of diligence on his part, it was an abuse of discretion for the trial court to deny his application for a continuance based upon the hearsay affidavit of one of his counsel, which application was not made until the hour of the day on which the case had been definitely set for trial after one continuance had theretofore been granted.

The granting or denial of a motion for continuance rests in the sound discretion of the court.

Girard Trust Co. v. Amsterdam, et al, 128 F. (2d), 376.

It is admitted that the granting or refusing of a continuance rests in the sound discretion of the court, and to entitle a party to a review, the party aggrieved must show conclusively an abuse of that discretion. This, we assert, appellant has not done, and the cases cited by appellant to this point as applied to the situation in the instant case are wholly inapplicable.

There might be merit in the contention had diligence been shown.

The record in this case shows clearly an entire

lack of diligence upon the part of appellant and his counsel.

It is admitted by appellant in his complaint that after going to Japan he renounced his American citizenship and became a Japanese citizen, therefore he, at the time of the filing of his complaint, was an alien and the statute whose provisions are sought to be invoked does not apply to aliens. What appellant sought to do was to obtain a certificate of identity from the Consul General of the United States in Japan entitling him to come to the United States for the purpose of attempting to convince the court in this country that he had no intention, when he became a Japanese citizen by naturalization, to renounce his American citizenship, but the Consul General, in full possession of the facts, refused and neglected to issue such certificate, consequently, as long as this certificate of identity could not be obtained, the appellant could never be admitted to the United States and he must rely upon evidence other than his own and, since the application for continuance was based solely on the inability of appellant to be physically present in a United States Court, in the absence of any showing that other witnesses whose testimony may be of value in determining intent, wherein can it be said the court abused its discretion?

A peculiar thing about this case is the entire lack of any showing that appellant himself is making any of the contentions advanced with reference to his intent. He did not, nor did anybody in his behalf, verify the complaint. He did not make any affidavit concerning his attempt to secure the necessary certificate of identity after the complaint was filed in the District Court in August, 1948, although one of his counsel says in his affidavit that he sent appellant a certified copy thereof for presentation to the American Consul in Japan. On the other hand, there is contained in Exhibit "A" an affidavit by appellant dated October 11, 1948, in which appellant gave as his reason for his renunciation of his American citizenship and acquisition of Japanese citizenship the purpose of bringing himself within the eligibility requirements for certain employment in Japan. He admits that his decision to become a citizen of Japan was made after having been refused only one position and that he had made no effort to apply for any other positions.

Appellant was granted Japanese citizenship March 25, 1943, which was six months before his graduation from Waseda University. It would therefore appear that employment requirements were not

the direct and immediate cause for his application for Japanese citizenship.

The case of *Royster v. Tederle*, 128 F. (2d) 197, cited by appellant at page 10 of his brief is not in point here because that was an action against a man in military service at the time of the institution of the action and there was specific statutory authority for the granting of a continuance under Sec. 103 of the Soldier's and Sailor's Civil Relief Act — 50 U.S.C.A. App. Sec. 513.

Counsel argue in this case that appellant was in no wise "negligent in failing to attend the trial."

Can it be said he was diligent when he made no attempt to have his deposition taken? We say not. In any event it is not a question of negligence, it is a question of diligence.

It is further argued that he had a right to be present at the trial. This, we deny. He is an alien by his own admission and this statute has no application to aliens. When the American Consul in Japan refused him a passport, and thereafter refused or failed to issue a certificate of identity, he had the right to appeal to the Secretary of State, which he nowhere alleges he did.

Neither the cases of *Acheson v. Murakami*, 176

F. (2d), 953, nor *Perkins v. Elg*, 307 U.S., 325, are authority for appellant's contention.

In the Murakami case there was involved the imprisonment of a Japanese at Tule Lake Concentration Camp, while in the Elg case there was involved the question of expatriation of a minor by the act of the parent.

The case of *Doreau v. Marshall*, 170 F. (2d), 721, cited by appellant although brought under the declaratory judgment act, differs from the instant case in that there Mrs. Doreau became a citizen of France, one of our allies in World War II, while here appellant became a citizen of Japan, one of our foes and with which Empire we were at war when the expatriation took place.

The case of *Podeau v. Acheson*, 179 F. (2d), 307, from the Second Circuit, is likewise distinguishable. There, against Podeau's will he was inducted into the Roumanion Army and was required to take the oath of allegiance to the King of Roumania, while here, the appellant was under no such compulsion, but was naturalized in Japan for the purpose of securing employment in Japan. Podeau on the one hand, as the opinion so clearly shows, made every effort possible to retain his American citizenship, while the exact opposite is true of the appellant here. Between

the time of the expiration of his registry with the American Consul in Japan in July, 1941, and the date of cessation of hostilities, no attempt was made by appellant to register at the American Consulate. In fact it was not until March 4, 1948, that he took up the matter with the consulate, — a period of almost seven years.

On the second phase of appellant's argument, the denial of a voluntary non-suit, we respectfully submit that the argument made is equally without merit and the authorities cited and relied upon do not sustain appellant's contentions.

CONCLUSION

It is respectfully submitted that the appeal should be dismissed for failure to file a cost bond. The rule applicable to appeals in forma pauperis are not here applicable merely because this court permitted the filing of a typewritten record and briefs.

To obtain the benefit of the provisions of Section 1915, Title 28, U.S.C., proceedings *in forma pauperis*, one must be a citizen of the United States. *Johnson v. Nickoloff*, 52 F. (2d) 1074. The appellant admitting he became a naturalized citizen of Japan when that Empire was at war with the United States,

is still in Japan, certainly is not entitled to use our courts without posting a bond.

In the event this contention is overruled, we respectfully submit that on the merits the judgment be affirmed.

Respectfully submitted,

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